

Avon Roofing and Sheet Metal Co. and Scott Gerow and Michael Henshaw

Local No. 4 of the United Union of Roofers, Waterproofers and Allied Workers of Newark, New Jersey and Vicinity (AFL-CIO) and Kevin Gerow and Scott Gerow and Michael Henshaw. Cases 22-CA-17301, 22-CA-17352, 22-CA-17358, 22-CB-6587, 22-CB-6607, and 22-CB-6634

September 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On December 7, 1992, Administrative Law Judge James F. Morton issued the attached decision. The Union and Avon filed exceptions and supporting briefs, the General Counsel filed an answering brief, and Avon filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

We agree with the judge that a request by the Union that Avon not recall the four discriminatees may be inferred from the circumstances here, as set out in the judge's decision. The Board has found that direct evidence of an express demand by the Union is not necessary where the evidence supports a reasonable inference of a union request. See *Warehouse Employees Local 20408 (Dubovsky & Sons)*, 296 NLRB 396, 403 (1989); *M. W. Kellogg Constructors*, 273 NLRB 1049, 1051 (1984), remanded on other grounds 806 F.2d 1435 (9th Cir. 1986). Therefore, we agree with the judge's conclusion that the Union unlawfully requested Avon not to recall the discriminatees and that Avon refused to recall them in response to that request.

In finding that the Union violated Section 8(b)(1)(A) and (2) through its unlawful request, we also rely on the credited testimony of Scott Gerow that, when he asked Union Steward Davis if Avon planned to recall a less senior employee rather than him, Davis stated that Avon was told not to rehire the four discriminatees and that the Critchleys were pressuring Avon not to rehire them. Contrary to the judge, we find that Davis' statement constitutes an admission against interest by the Union. The record demonstrates that Davis' role as the steward at Avon included the

¹ The Union and Avon have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

administration of the seniority provisions of the collective-bargaining agreement, and that he kept a copy of the seniority list during the layoff. Therefore, we find that Davis was acting as the Union's agent in making statements concerning the reason why Gerow would not be recalled in favor of a less senior employee. See *Weco Cleaning Specialists*, 308 NLRB 310 fn. 2 (1992). To the extent that this finding is inconsistent with *Albritton Communications*, 271 NLRB 201, 205 fn. 12 (1984), relied on by the judge, that case is overruled.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Avon Roofing and Sheet Metal Co., West Orange, New Jersey, its officers, agents, successors, and assigns, and Local No. 4 of the United Union of Roofers, Waterproofers and Allied Workers of Newark, New Jersey and Vicinity (AFL-CIO), Newark, New Jersey, its officers, agents, and representatives, shall take the action set forth in the Order.

² We note that the General Counsel stated at the hearing that it offered Davis' statement as an admission by the Union and not against Avon.

Steven M. Kessler, Esq., for the General Counsel.

John K. Bennett, Esq. (Carpenter, Bennett & Morrissey), of Newark, New Jersey, for Avon Roofing and Sheet Metal Co.

Paul A. Montalbano, Esq. (Schneider, Cohen, Solomon, Leder & Montalbano), of Cranford, New Jersey, for Local No. 4 of the United Union of Roofers, Waterproofers and Allied Workers of Newark, New Jersey and Vicinity, (AFL-CIO)

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint as amended, that issued in these consolidated cases, alleges that Local 4 has committed unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) and that Avon has committed unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act. Specifically, Local 4 is alleged to have engaged in the following conduct by the persons named as its agents:

(a) On or about September 14, 1990, by Michael Critchley, it threatened employees that they would not be referred to work because of their internal union activities.

(b) On about September 18, 1990, by Robert Critchley and David Critchley, it threatened employees that they would not be referred to work because of their internal union activities.

(c) On or about October 11, 1990, it requested Avon Roofing to refuse to recall Scott Gerow, John Gerow, Michael Henshaw, and Jerry Nave to work.

Avon Roofing is alleged to have acceded to Local 4's request and also to have refused to offer employment to Scott Gerow because he filed an unfair labor practice charge with the Board.

The answers filed by Local 4 and Avon Roofing deny these allegations.

I heard the case in Newark, New Jersey, on February 24 and 25, and on April 15 and 20, 1992. On the entire record,¹ including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, Local 4, and Avon, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Avon is a roofing contractor. In its operations annually it meets the Board's jurisdictional standard for nonretail businesses.

The Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The members of Local 4 are journeymen roofers. Local 4 operates a referral hall in Parsippany, New Jersey, from which it sends roofers to employment with, inter alia, Avon. Individuals also can obtain employment with roofing contractors, including Avon, by applying directly to them.

The four individuals alleged as discriminatees are members of Local 4. They were laid off from Avon in late spring 1990 due to lack of work. The General Counsel contends that Local 4 requested Avon not to recall them when work picked up in October 1990 and that Local 4 made that request because the four alleged discriminatees had engaged in internal union activities.

B. Those Activities

The testimony proffered by the General Counsel pertains to three aspects of union activities alleged to be the basis for Local 4's alleged discriminatory demand.

The first pertains to whether Scott and John Gerow led an effort to oust John (Jack) Critchley from his post as business manager of Local 4, a post he has held uncontestedly for 32 years. Critchley's sons, David and Robert, are two of Local 4's business agents. Another son, Michael, administers a roofing apprenticeship program set up by contractors and roofing locals in New Jersey.

The testimony of Scott Gerow indicates that, beginning in October 1989, he and his brother, John, had talked to many of Local 4's members about their running against Jack Critchley and his sons. Scott Gerow testified that he had been under the mistaken impression in October 1989 that the next election for Local 4's officers was scheduled for June 1991. In fact, an election had been held in June 1989 and the next election was set then for 1992; elections are held

every 3 years. He testified also that, in 1990, he continued to talk at various jobsites with Local 4 members about his running against Jack Critchley.

John Gerow, Scott's brother, had been a member of Local 4's executive board for 13 years, until he resigned from it in September 1990. He testified that he and Scott first discussed challenging the Critchleys in January 1991. He corrected that testimony to place the starting point in January 1990. John Gerow was among several Local 4 members who were designated by Local 4 in March 1990 to the post, sergeant-at-arms.

Michael Henshaw testified for the General Counsel that John Gerow had "dabbled" with the idea of running for union office months before Henshaw began working for Avon in September 1989 and that Gerow continued to talk along those lines.

Jerry Nave, when he testified for General Counsel, did not allude to any campaign by the Gerow brothers.

The foregoing accounts disclose that Scott and John Gerow had undertaken no organized campaign to oust Jack Critchley; they discussed with other employees, on an intermittent basis, the idea of opposing him.

The second aspect of internal union activities pertains to events at a Local 4 meeting in March 1990. The members were voting on a recommendation by the executive board as to how to divide a certain earnings increase among their wage rates and their benefit programs. One member, Frank Moorehouse, voiced his opposition; there is no contention that he was discriminated against. John Gerow asked Jack Critchley whether benefit funds were getting a fair return on their investments. Jack Critchley later arranged to have the funds' actuary write Gerow to allay his concern. Alleged discriminatee, Henshaw, stated that more of the money should be allocated to wages and less to the funds. The membership voted in favor of the recommendation of the executive board which allotted more to the funds. In sum, nothing occurred at the March 1990 meeting which could relate to alleged discriminatory acts 7 months later.

The third aspect of internal union activities concerns an incident involving Henshaw and Jack Critchley in late June 1990 and to related matters. Henshaw was among those employees of Avon who were laid off in late May 1990. He, each day thereafter for several weeks, sought referrals at the Local 4 hall. He testified that a roofer, who had signed the referral roster after he had, telephoned him one day and told him, among other things, that he had been referred from the Local 4 hall. Henshaw later asked Local 4's business agent, David Critchley, how that roofer got the job. Critchley told him that that roofer had "shopped it," i.e.—that he got it on his own application. Henshaw told Critchley that that was not true. David Critchley referred Henshaw to Jack Critchley who then instructed his son to send Henshaw to work with Barrett Roofing Company. At that point, Henshaw asked why he had not been sent out to Barrett earlier and was told that he was getting sent out, even though he was not at the head of the referral roster. He then went to work for Barrett.

C. Alleged Coercive Statements

The complaint alleges that, on about September 14, 1990, Local 4, by Business Agent Michael Critchley, made coercive statements. Local 4 asserts that Michael Critchley is not an agent of Local 4, as he is an employee of an apprentice-

¹ Counsel for Local 4's motion to supplement the record by accepting in evidence a certified plea form bearing the seal of the Superior Court of New Jersey is denied for the reasons set forth in fn. 2 in *Jacob E. Decker & Sons*, 223 NLRB 70 (1976). The plea form shall be marked as a rejected exhibit, R. Exh. 11.

ship program, an entity entirely separate from Local 4. The General Counsel asserts that, nonetheless, he has served as a Local 4 agent. The testimony in the record is uncontroverted that Michael Critchley has referred employees from Local 4's hiring hall; he has been called to jobsites where he adjusted grievances of employees with employers; he reported to the membership at Local 4 meetings as to the status of various jobs; he sat on the dais with Local 4's officers at the March 1990 meeting discussed above and took over, from his father, to respond to questions as to how monies were to be allocated between wages and benefit funds. I thus find that Michael Critchley is an agent of Local 4 and that Local 4 is accountable for his actions as its agent. See *Hotel & Restaurant Employees Local 50 (Dick's Restaurant)*, 287 NLRB 1180, 1185 (1988), and cases cited therein.

On about September 12, 1990, Michael Critchley told John Gerow that Henshaw had some trouble with his father, Jack Critchley, at the hiring hall—a reference to the Henshaw's complaint about another employee having been given preference, as discussed above. Critchley told Gerow that he should persuade Henshaw to apologize to Jack Critchley. Gerow declined, saying Henshaw may have been right. Critchley then urged Gerow to have Henshaw "eat a little humble pie" and that he, Michael Critchley, would then "work everything out with the boss," a reference to Jack Critchley. Michael Henshaw then told Gerow that he had heard that Gerow was going to cause some problems at the next union meeting. Gerow replied, "We have no problems."

On Friday, September 14, 1990, John Gerow and Henshaw were at the Pacemaker Lounge in Irvington, New Jersey. Michael Critchley came in later and joined them. He asked Henshaw to apologize to his father. Henshaw said he would not and Gerow stated that maybe Henshaw is right. Michael Critchley then stated that he had heard that Gerow's brother was going to run for business agent and that John planned on running for president of Local 4. Michael Critchley told him that they would be destroyed financially if they decided to run, and that if they ask any questions at a union meeting, they would never work again.

On the following Monday, September 17, John Gerow, Scott Gerow, their brother Kevin Gerow, Michael Henshaw, and Jerry Nave went, as a group, to Local 4's referral hall in Parsippany, New Jersey. They exchanged some unpleasanties with John Critchley. Scott Gerow's testimony alludes in part to the subject matter of Respondent Union's Exhibit 11, discussed above at footnote 1. They asked him where Michael Critchley was as they wanted him there to straighten out a problem they had. They also asked him if he sent Michael down to do his dirty work in telling Henshaw to apologize and the Gerows to keep their mouths shut. Jack Critchley said that Michael Critchley has nothing to do with Local 4. "[W]ords went back and forth." At one point, Scott Gerow told Jack Critchley, in somewhat forceful language, that he was going to take over control of Local 4.²

²Local 4 and Avon has urged that the Gerows, Henshaw, and Nave made racial remarks and used vulgar invectives which were not protected by the Act. There is no contention by Local 4 or Avon however, that the Gerows, Henshaw, and Nave thereby had forfeited any seniority rights with Avon. Nor does this case involve the lawfulness of an internal union charge against the Gerows for abusive conduct. In fact, Avon's superintendent initially advised Scott Gerow

The four alleged discriminatees returned, as a group, to the Local 4 hall the next day. Jack Critchley asked Nave to "stay out of this." Nave replied that he "was not walking away." The Gerows came with a policeman to escort them. There was no disturbance in the hall as the alleged discriminatees signed in. While leaving, Michael Critchley told them that there was no sense in their returning as they would never work again.³

Local 4 contends that Jack Critchley's saying on September 18 that Local 4 is not responsible for Michael Critchley's threats to employees requires dismissal of the allegation that it, by his conduct, coerced employees as to their Section 7 rights. In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board noted that it was well settled that a repudiation of an agents' conduct, to be effective, must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct, and also that it must contain assurances that there will be no interference with employees' Section 7 rights. Jack Critchley's summary comment, in the course of a heated exchange, does not meet the *Passavant* requirements for an effective repudiation. I therefore find that Local 4, by the threats of its agent, Michael Critchley, to employees that they will never work again out of Local 4's referral hall because they voiced interest in opposing the Local 4's business manager, restrained and coerced employees in the exercise of their rights under Section 7 of the Act.

D. The Alleged Discriminatory Conduct

1. The evidence

Placid Carmeci is Avon's superintendent, responsible for all of its jobsites, including the hiring of employees. He has 35 years' experience in the roofing industry, the last 15 as Avon's superintendent, administering, inter alia, the collective-bargaining agreement with Local 4.

After the incidents at the Local 4 referral hall on September 17 and 18, 1990, recounted above, Scott Gerow visited Carmeci's office on a regular basis to inquire as to when he would be recalled to work. Carmeci assured him that he would be called back as soon as work picked up. At one point, Gerow asked him if the altercation that took place at Local 4's hall would affect his status. Carmeci told him it would not.

In the early part of October 1990, Scott Gerow was told by Kenneth Alley, an employee just above him on Avon's seniority list, that he had just quit his job with Avon. Alley also told Gerow that Avon would not recall him but would recall a roofer with less seniority, Marty Sierra.

Gerow telephoned the Local 4 steward for Avon, Gary Davis. Gerow and Davis gave conflicting versions of their discussion.

Gerow's account is as follows. He asked Davis if Avon planned on calling Sierra back instead of him. Davis told

that he was aware of the altercation at Local 4's hall on September 17 and that it would not affect his recall rights. When Gerow was not recalled, as discussed later, Avon's superintendent gave a reason thereof which was unrelated to the altercation.

³The complaint was amended at the hearing to allege that Local 4's business agents, Robert Critchley and David Critchley, unlawfully threatened employees that same day. No evidence thereof was produced. That allegation lacks merit.

him that Avon was thinking of calling Sierra back. Davis said that he has known the Gerow family for a long time and is a very good friend but he hates to say that Avon was told not to hire all four of them, Scott and John Gerow, Henshaw, and Nave. Davis told him that the Critchleys were pressuring Avon not to hire them.

Davis' testimony is as follows. He is very friendly with the Gerow family. Scott Gerow called him, saying he thought his seniority at Avon had been violated and that he heard Avon called people to work but not him. He told Gerow that this was not true, that Avon had not hired anyone back. When Scott Gerow told him that he was going to go to the Labor Board, he told Scott that he was wasting his time. Gerow had vaguely mentioned the name, Sierra. Davis also told Gerow basically that as Gerow had worked for three or four other contractors since he was laid off, he had no seniority. He explained to Gerow that Avon does not have to call him back as "once [he puts] his name and works for some other employer, they don't have to 'recall him.'" (The collective-bargaining agreement provides that an employee loses his place on a seniority roster for recall purposes by going to work for another employer, or by signing the Local 4 referral roster, while on layoff.)

Davis' account gives me pause. It seems unlikely that he, as a close friend of Scott Gerow, would cite to him the provisions of the collective-bargaining agreement as a basis as to why Avon was not under an obligation to recall him. The account given by Scott Gerow as to their conversation has a more believable ring to it and I credit it.

On October 12, 1990, Scott Gerow filed the unfair labor practice charges in Cases 22-CA-17301 and 22-CB-6607 against, respectively, Avon and Local 4.

Scott Gerow testified that, in the 7 years he has worked for Avon, he never previously had been passed over on recalls from layoffs.

In late October 1990, Avon recalled three employees who had been below Scott Gerow on its seniority roster at the time of the layoff earlier that year. Gerow visited the office of Avon's superintendent, Carmeci, in early November. The substance of his discussion with Carmeci then is in dispute.

Gerow's account thereof is as follows. When he asked why Carmeci called back three men and not him, Carmeci replied that the reason was personal. When Gerow asked in substance what that meant, Carmeci said that it was because Gerow had gone down to the Labor Board on him. Gerow told him that he was forced to do it because otherwise the Critchleys would tell every boss not to hire them. Carmeci, shaking his head, said nothing. Gerow then asked if Carmeci would do him one favor, by giving him a copy of the seniority roster. Carmeci said that Jack Critchley had the list. He also said to Gerow that it is a shame that all this happened.

On the following day, Gerow filed the unfair labor practice charge in Case 22-CA-17352 alleging a violation of Section 8(a)(1) and (4) of the Act.

Carmeci's account of the conversation is as follows. Scott Gerow told him that Carmeci might just as well hire him as he was sure of winning his case against Avon. Carmeci told him that he would take his chances on that because he had been told by Jack Critchley, soon after he received a copy of the first unfair labor practice charge Scott Gerow had filed, that Gerow lost his seniority with Avon when he

worked for another roofing contractor since his layoff from Avon. Gerow told him that he had not worked elsewhere.

It is highly unlikely, that Scott Gerow would have told Carmeci on November 5 that he had not worked for another contractor after being laid off from Avon. Gerow had not kept secret his employment with another contractor, Kadco, while on layoff from Avon.⁴ He had talked openly with Local 4's steward at Avon, Davis, about his being sorry he left Kadco to go back to Avon for a week in July 1990. I credit Gerow's account.

As to Carmeci's account, that he had asked Jack Critchley about Scott Gerow's seniority status, Jack Critchley gave this version. Carmeci called him in late September or early to mid-October and asked if Scott Gerow worked elsewhere and if so, does that mean that he lost his seniority with Avon.

I find it difficult to accept Jack Critchley's account. Carmeci has decades of experience in the roofing business. In his last 15 years, he has been Avon's superintendent, administering the collective-bargaining agreement Avon has with Local 4. It is improbable that he would have taken the occasion of Gerow's filing an unfair labor practice charge in October to acquaint himself with the seniority provisions of that agreement.

Avon has not recalled any of the four discriminatees.

Local 4 and Avon assert that the four discriminatees had lost their recall rights with Avon (1) as the collective-bargaining agreement expressly provides that an employee loses his place on a seniority roster either by signing the Local 4 referral sheet after layoff or by working for another roofing contractor after layoff and (2) as they all worked for other contractors after being laid off from Avon and as they all signed the Local 4 referral list on September 17. The General Counsel contends that, notwithstanding the contract language, the actual practice followed by Avon and Local 4 was that employees were retained on Avon's seniority roster, regardless of their having worked elsewhere and regardless of their having sought referrals out of Local 4's hall.

As noted above, Scott Gerow testified credibly that, prior to October 1990, Avon had always called him back despite the fact he worked elsewhere. In that regard, I credit his testimony that, in July 1990, Carmeci telephoned him and asked him to come back and that, when he told Carmeci that he was on a job with Kadco and wanted to stay there, Carmeci persuaded him to return to Avon. As noted above, Gerow later told the Local 4 steward for Avon that he regretted having left Kadco to return.

I credit also the testimony of Kenneth Alley, a Local 4 member, which established that Carmeci recalled him to work, based on his seniority, notwithstanding that Carmeci knew he had been working for another roofing contractor since his layoff from Avon.⁵

⁴ Gerow's account of an earlier conversation he had with Carmeci respecting his leaving Kadco to return to Avon is discussed separately.

⁵ Alley credibly testified as follows. Carmeci telephoned him while he was on layoff from Avon and asked if he was working. When Alley responded that he was working for Barrett Roofing, Carmeci asked if it was all right if he called back before him, Al and Rodney Gavenos. They were behind Alley on the recall roster. Carmeci explained that the Gavenos were not working. Alley told Carmeci that he had no objection. Alley later was recalled by Carmeci. (As indicated above, Alley later quit Avon and Scott Gerow expected to be

I find that Avon has followed the practice of recalling employees from layoff according to its seniority roster, regardless of the fact that they had worked for other contractors since their layoff or the fact that they had signed the Local 4 referral sheet. Local 4's steward at Avon had to be aware of this practice; the evidence also discloses that employees call in to the Local 4 hall to advise where they are working, and that employers file regular reports with Local 4 as to contributions to various funds for their respective employees. In short, the practice described above has been allowed to supersede the language of written agreement between Avon and Local 4.

2. Analysis

The General Counsel has the burden of establishing, by a preponderance of the evidence, the essential elements of the unfair labor practices alleged. *Ramar Coal Co.*, 303 NLRB 604 fn. 1 (1991). It is incumbent on the General Counsel to make out a prima facie case that Local 4 asked Avon to forego recalling the four alleged discriminatees and that Avon failed to do so based on that request; the General Counsel must also make out a prima facie showing that Avon failed to recall Scott Gerow because he had filed an unfair labor practice charge against it. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Once the General Counsel has established a prima facie case, the burden shifts to the respondent to show that it would have taken the same action, notwithstanding the alleged discrimination. *Electromedics*, 299 NLRB 928 (1990); *P.I.E. Nationwide*, 295 NLRB 382, 388 (1989).

The evidence in this case discloses that the Gerows had talked, from time to time, with various employees about opposing the Critchleys for control of Local 4. Scott Gerow also made his interest clear when he told Jack Critchley of it on September 17, 1990. The evidence also discloses that Michael Henshaw had protested to Jack Critchley that roofers were not being referred out of Local 4's hall in accordance with the signing sheet and that John Gerow later endorsed Henshaw's action. As to the fourth discriminatee, Nave, he rejected Jack Critchley's request that he refrain from being with the Gerow group.

Local 4's animus as to the foregoing activities is clear from the coercive conduct of Michael Critchley. Also, Jack Critchley impressed me as one who is easily angered. He has been business manager of Local 4 for 32 years without oppo-

sition. It is easy to understand, in this context, Michael Critchley's urging Henshaw to eat a little humble pie to allay Jack Critchley's feelings. Further evidence of animus is contained in the statement later of the Avon shop steward that the Critchleys were pressuring Avon not to recall the discriminatees.⁶

The credited evidence discloses too that Avon's superintendent told Scott Gerow that he was not recalled because he had filed an unfair labor practice charge against him. The accounts given by the superintendent and by Jack Critchley as to why Scott Gerow was not recalled are at variance.

An unlawful act, in the absence of direct evidence, is generally established through inference from the record as a whole. *Continental Can Co.*, 291 NLRB 290, 291 fn. 5 (1988). While there is no testimony as to an express request having been made by Local 4 to Avon not to recall the alleged discriminatees, one may be inferred from the overall circumstances. Cf. *Key Waterproofing Co.*, 268 NLRB 879, 883 (1989), and cases cited therein. From the circumstances described below, I infer that Local 4 made such a request of Avon. Jack Critchley was not mollified by an apology his son, Michael, sought from Henshaw for having challenged the referral procedures; he was also perturbed by the Gerow's interest, howsoever tentative, to challenge his long tenure. Local 4 threatened the alleged discriminatees with financial ruin in a futile effort to dissuade them from such actions. Local 4's steward at Avon warned that the Gerows would not be recalled because of pressure exerted by the Critchleys. Jack Critchley talked with Avon's superintendent and indicated that Scott Gerow could not be recalled; his testimony, as noted above, as to the contents of that discussion, is not plausible.

The circumstantial evidence demonstrates that Avon's failure to recall the discriminatees was attributable to a request therefor from Local 4, cf. *Electrical Workers Local 262 (Arthur Paul Contractor)*, 264 NLRB 251 (1982). Such a request, in the absence of any legitimate basis, is unlawful. *Id.*

The General Counsel has made out a prima facie case that Local 4 unlawfully requested Avon not to recall the four discriminatees from layoff, that Avon unlawfully accommodated Local 4, and that Avon also refused to recall Scott Gerow because he had filed an unfair labor practice charge with the Board.

No credible evidence was proffered by Local 4 or Avon to prove that the four discriminatees would not have been recalled, about the unlawful motivation.

The contention by Local 4 and Avon that they were simply applying the provisions of their collective-bargaining agreement, as to recall rights based on seniority, lacks merit. There is no credible evidence to support it. Further, the practice long followed by Avon was never in accord with these provisions and certainly Local 4 had long acquiesced in that practice.

I therefore find that Local 4 caused Avon not to recall the Gerows, Henshaw, and Nave although it had no legitimate basis to do so and because of their internal union activities, and that Avon failed to recall them because of Local 4's unlawful request. I further find that Avon refused to recall

recalled to replace him.) Avon would have me discredit Alley's account of his conversation with Carmeci on the ground that Alley made no record of it in his notebook, even though he testified that his notebook contained a complete record of all matters relating to his work assignments. His notebook had been placed in evidence by the General Counsel to corroborate his testimony and Alley expressed surprise when he could not find, in his notebook, a reference to that conversation. The notebook contained personal data and crude language as to some of the jobs he worked on. Notwithstanding that the notebook did not corroborate his account, I still credit Alley's testimony. His account was vivid. It is unlikely that he concocted it to help Gerow. He lacks the sophistication to have conjured up so plausible an account as to how two less senior employees were recalled ahead of him. Records of hours worked by Local 4 members disclose that Alley worked for Barrett Roofing as of August 27 and that the Gavenos came back to Avon at the same time.

⁶The panel majority holding at fn. 12 in *Allbritton Communications*, 271 NLRB 201, 205 (1984), indicates that the steward's statement does not constitute an admission against interest by Local 4.

Scott Gerow because he had filed an unfair labor practice charge against it.

CONCLUSIONS OF LAW

1. The Respondent Employer, Avon Roofing and Sheet Metal Co. (Avon) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Union, Local No. 4 of the United Union of Roofers, Waterproofers and Allied Workers of Newark, New Jersey and Vicinity (AFL-CIO) (Local 4) is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees that they would not work again and with financial ruin because they opposed the leadership of Local 4, Local 4 has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. By causing Avon to refuse to recall from layoff Scott Gerow, John Gerow, Michael Henshaw, and Jerry Nave because of their opposition to the leadership of Local 4 and without any legitimate basis therefor, Local 4 has restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and has caused Avon to discriminate against its employees in violation of Section 8(a)(3) of the Act, and Local 4 thereby has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

5. By refusing to recall those four employees in response to Local 4's request, as described above, Avon has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. By failing and refusing to employ Scott Gerow because he had filed an unfair labor practice charge against it, Avon has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (4) of the Act.

7. Respondents Avon and Local 4 have engaged in no other unfair labor practices alleged in the complaint, as amended.

8. The unfair labor practices described above in paragraphs 3, 4, 5, and 6 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Local 4 and Avon have engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom, and to take certain affirmative actions to remedy the unfair labor practices, to effectuate the policies of the Act.

Local 4 shall be required to notify the four discriminatees in writing, and to also notify Avon in writing, that it has no objection to Avon's recalling them to work from layoff. Avon will be required to offer the discriminatees immediate and full reinstatement to their positions of employment, together with all seniority and other rights and privileges enjoyed and, if there are no jobs available for them, to offer them substantially equivalent jobs. Local 4 and Avon shall, jointly and severally, make them whole for any loss of earnings they may have suffered because of the discrimination against them in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

A. The Respondent, Local No. 4 of the United Union of Roofers, Waterproofers and Allied Workers of Newark, New Jersey and Vicinity (AFL-CIO), its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees that they would no longer work as roofers if they oppose the leadership of Local 4.

(b) Causing Avon Roofing and Sheet Metal Co. to refuse to recall employees from layoff without having any legitimate basis therefor and because of their internal union activities.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify Avon Roofing in writing that it has no objection to its recalling from layoff Scott Gerow, John Gerow, Michael Henshaw, and Jerry Nave.

(b) Notify these four employees in writing that it has no objection to their being recalled by Avon Roofing.

(c) Jointly and severally with Avon Roofing, make these four employees whole for any loss of earnings and benefits they suffered by reason of its having caused Avon Roofing not to recall them to work from layoff in 1990, with interest thereon, as described above in the remedy section.

(d) Post at its offices, meeting halls, and hiring halls copies of the attached notice, marked "Appendix A."⁸ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

B. The Respondent, Avon Roofing and Sheet Metal Co., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recall employees to work from layoff pursuant to requests from Local No. 4 of the United Union of Roofers, Waterproofers and Allied Workers of Newark, New Jersey and Vicinity (AFL-CIO) which have no legitimate basis therefor.

⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Refusing to employ an employee because he filed an unfair labor practice charge with the Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer John Gerow, Scott Gerow, Michael Henshaw, and Jerry Nave immediate and full reinstatement to their former positions of employment, together with all seniority and other rights and privileges previously enjoyed, or if those jobs are no longer available, to substantially equivalent employment.

(b) Jointly and severally with Local No. 4, make these four employees whole for any loss of earnings and benefits they suffered as a result of the discrimination against them, with backpay to be computed with interest, thereon, as provided for in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Newark, New Jersey office copies of the notice marked "Appendix B."⁹ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Unfair labor practices alleged in the complaint, as amended, which are not found to have merit, are dismissed.

⁹ See fn. 8, above.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with financial ruin or threaten not to refer them to work because they have expressed a desire to run for union office.

WE WILL NOT cause or attempt to cause Avon Roofing and Sheet Metal Co. to refuse to recall to work from layoff any of its employees without our having a legitimate basis to do so or because of their internal union activities.

WE WILL NOT in any like or related manner restrain or coerce any employee in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL, jointly and severally, with Avon Roofing and Sheet Metal Co. make Scott Gerow, John Gerow, Michael Henshaw, and Jerry Nave whole, with interest, for any loss of earnings and benefits they suffered by reason of our having caused Avon Roofing not to recall them from layoff when we had no legitimate basis to do so and because they had engaged in internal union activities in expressing opposition to our leadership.

LOCAL NO. 4 OF THE UNITED UNION OF
ROOFERS, WATERPROOFERS AND ALLIED
WORKERS OF NEWARK, NEW JERSEY AND VI-
CINITY (AFL-CIO)

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recall from layoff any employees in order to accommodate a request therefor made by Local 4 of the United Union of Roofers, Waterproofers and Allied Workers of Newark, New Jersey and Vicinity (AFL-CIO) unless there is a legitimate basis therefor.

WE WILL NOT refuse to hire any employee because he has filed an unfair labor practice charge against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL offer Scott Gerow, John Gerow, Michael Henshaw, and Jerry Nave immediate and full reinstatement to their former jobs or, if those jobs are no longer available, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL, jointly and severally, with Local 4 make these four employees whole, with interest for any loss of earnings and benefits they suffered as a result of our refusal to recall them to work based on a request therefor by Local 4 when it had no legitimate basis to do so or as a result of our refusal to employ Scott Gerow because he had filed an unfair labor practice charge against us.

AVON ROOFING AND SHEET METAL CO.